STATE OF MICHIGAN

COURT OF APPEALS

SHAQUITA GREENWOOD, Personal Representative of the Estate of LAVERNE GREENWOOD, Deceased,

Plaintiff-Appellant,

v

COLONY ARMS LIMITED DIVIDEND HOUSING ASSOCIATION LIMITED PARTNERSHIP, AMERICAN APARTMENT MANAGEMENT COMPANY, INC., and PEI, INC.,

Defendants-Appellees,

and

NLR CORPORATION, d/b/a JAY RYAN MANAGEMENT COMPANY, and JEFFERSON AVENUE LIMITED,

Defendants.

UNPUBLISHED
March 29, 2007

No. 265531
Wayne Circuit Court
LC No. 04-403939-NO

Before: Markey, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

In this wrongful death action, plaintiff appeals as of right the trial court's "Judgment of No Cause of Action." We affirm.

I. Pertinent Facts

Plaintiff filed a complaint on behalf of her deceased mother, Laverne Greenwood. Greenwood, who was wheelchair bound, resided at Fisher Arms Apartments, which are owned by defendant Colony Arms Limited Dividend Housing Association Limited Partnership. A handicap ramp was Greenwood's sole means of entering and exiting the building. Plaintiff alleged that, while using the ramp to exit the building, Greenwood lost control of her wheelchair and injured her toes, leading to multiple surgeries, leg amputation, and, eventually, death. Plaintiff alleged the defective condition of the ramp caused Greenwood's death.

Two days before trial, defendants filed a "Motion in Limine to Strike Plaintiffs' Expert or Quash Testimony." In that motion, defendants argued that plaintiff's proposed causation expert Dr. Jack Belen "does not satisfy MRE 702 or 703 and should be stricken or quashed." More specifically, defendants argued, "Dr. Belen is neither qualified to render opinions as to the relevant issues and has not conducted an analysis that is scientifically reliable nor relevant to this lawsuit." In regard to the second argument, defendants argued that under the standards set forth in *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 469 (1993), the trial court must consider whether Dr. Belen's method was tested, subject to peer review, published, had a known error rate, maintained standards and controls, and whether there was wide-spread acceptance of his method. Defendants cited Dr. Belen's deposition testimony that he was unaware of any testing or research that supported his opinion. He also stated that he did not review any medical data that would support his opinion. Accordingly, defendants argued that Dr. Belen's opinions were based on nothing more than conjecture and speculation.

In her response, plaintiff argued that Dr. Belen was qualified to testify on causation and that he need not be a forensic pathologist or a medical examiner to render that opinion. While admitting that MRE 702 and *Daubert* were applicable to Dr. Belen's testimony, plaintiff asserted that "[t]he opinions [Dr. Belen] formed after looking at the medical evidence in this case were formed using all his education, training and experience." Plaintiff further asserted, "It is not at all unusual for a doctor to form a viable medical opinion using their training after looking through a patient's past medical records, which is precisely what Dr. Belen did in this case." Further, plaintiff asserted,

> Dr. Belen's expertise is not in determining what immediately caused Ms. Greenwood's untimely demise, but rather what is the *information or sequence of events* starting from that day she injured her foot that ultimately led to Plaintiff's sudden death from cardiac arrthythmia [sic] as listed on the death certificate. [Emphasis in original.]

On the scheduled first day of trial, the trial court conducted a hearing on defendant's motion. The trial court began by stating that it had read Dr. Belen's two depositions. After plaintiff's counsel indicated that Dr. Belen would be called to give live testimony, the trial court asked whether he would testify "along the lines of these discovery depositions?" Plaintiff's counsel answered, "[G]enerally speaking, yes." Defense counsel then offered argument largely focusing on whether Dr. Belen was qualified. But the argument also touched on whether Dr. Belen undertook any research or was aware of any research that supported his opinion. Likewise, plaintiff's counsel's argument focused largely on Dr. Belen's qualification, but he also responded to the argument concerning Dr. Belen's testimony stating, "Counsel criticizes Dr. Belen for not doing research or not citing peer review journals. [Defendants' expert] did not do that, either . . . ." The trial court stated on the record:

> Dr. Belen acknowledges in his testimony that all the various different possibilities of the mechanism of this death, one of which includes this over-steep ramp. But what he does at every juncture which allows for more than one possibility simply resolves the uncertainty in favor of the plaintiff's theory.

> And when he does that, he's not acting as a doctor, he's acting as a juror, just like he's making the inferences, and he resolves every uncertainty in favor of the plaintiff. You can't do that. He wasn't there.
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> Just like Dr. Spitz wasn't there. And so he has to say well, yes, if you list all of the possible mechanisms of death, I can't exclude the one that the plaintiff favors. So he is failing to – he is admitting only one – his inability to resolve only one of the mechanisms of death.
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> Dr. Belen is taking – is doing the opposite, and that is resolving all of the other possibilities, save the one, in favor of the plaintiff's version. That doesn't make out a prima facie case.
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> * * *
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> There is in this case myriads of different possibilities of the mechanisms of injury, and all Dr. Belen has done is affirm all the various junctures – all the various junctures of possibilities and taken every one of them and said in my opinion that there was the stubbing of the toe that caused the death.
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> And this absolutely ignores all the other possibilities. He can't do that. He can't give that – he will not be allowed to give that kind of opinion. This – like I say, it's not – this case is governed – like by the same – principles announced in two cases that I can think of.
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> One is [*Skinner v Square D Co*, 445 Mich 153; 516 NW2d 475 (1994)] and the other one is [*Nelson v American Sterilizer (On Remand)*, 223 Mich App 485; 566 NW2d 671 (1997).] The fact of the matter is that you don't need law to tell you what those two cases say. [*Skinner*] says nothing more than affirm a proposition that existed before there was courts and that is – affirms the proposition that he who asserts must prove.
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> * * *
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> If [Dr. Belen] was the most qualified vascular surgeon in the world, he couldn't give that opinion. If he could give the opinion, no jury on the basis of this record would be permitted to accept it.
>
> This is not a jury submissible case, and you may present a judgment of no cause of action.

On the order portion of the praecipe for defendants' motion, the trial court checked the box indicating that the motion to strike Dr. Belen or quash his testimony was "GRANTED AND IT IS FURTHER ORDERED AND ADJUDGED:," but nothing further was written. Subsequently, pursuant to the seven-day rule, an order was entered stating: "IT IS HEREBY ORDERED that Judgment of No Cause of Action is granted in favor of Defendants."

Plaintiff filed a motion for reconsideration. In that motion, plaintiff erroneously stated that the trial court dismissed the case pursuant to MCR 2.116(C)(8) for failure to state a claim. Plaintiff also asserted, "There was no hearing on the issue of causation." The trial court denied plaintiff's motion.

II. Analysis

On appeal, plaintiff contends that the trial court failed to address the arguments raised in defendants' motion in limine to strike Dr. Belen or quash his testimony, but instead granted summary disposition even though defense counsel had never asked for it. Plaintiff contends that dismissal was erroneous because she did not have an opportunity to present any argument in that regard. We disagree.

From reading the transcript of the motion hearing, it is clear that after reviewing the evidence, the trial court dismissed plaintiff's claim on the basis that there was no genuine issue of material fact regarding the cause of plaintiff's death. We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002).

While the trial court's ruling could certainly have been clearer, plaintiff's characterization of what occurred is not accurate. The issues raised in defendants' motion were 1) whether Dr. Belen was qualified to render causation testimony and 2) whether his testimony was sufficient to meet the requirements of MRE 702 and *Daubert*. The trial court did not rule on whether Dr. Belen was qualified. It ruled that, even assuming that Dr. Belen was qualified, his testimony did not meet any logical let alone scientific standards. Thus, the trial court's ruling was within the purview of the issues raised in defendants' motion in limine, an issue that plaintiff had ample notice of and the opportunity to brief and argue.

After the trial court determined that Dr. Belen's testimony was inadmissible, it proceeded to dismiss plaintiff's case for lack of evidence on the element of causation. The trial court had authority to do this even though defendants had not yet filed a motion for summary disposition. A court may dismiss a case pursuant to MCR 2.116(I) if "the pleadings show that a party is entitled to judgment as a matter of law" or "the affidavits or other proofs show that there is no genuine issue of material fact." *Boulton v Fenton Twp*, 272 Mich App 456, 462-463; 726 NW2d 733 (2006). The rule does not expressly require a motion under MCR 2.116(C) to grant summary disposition, nor does it forbid summary disposition absent a motion under MCR 2.116(C). *Id.* Further, although proximate cause is generally a factual issue to be decided by the trier of fact, *Dep't of Transportation v Christensen*, 229 Mich App 417, 424; 581 NW2d 807 (1998), if the facts bearing on proximate cause are not disputed, and if reasonable minds could not differ, the issue is one of law for the court, *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002); *Rogalski v Tavernier*, 208 Mich App 302, 306; 527 NW2d 73 (1995). Here, plaintiff's only causation expert was Dr. Belen and his testimony was ruled inadmissible. Without any admissible evidence to establish causation, there was no genuine issue of material

fact one of the prima facie elements of plaintiff's case. Therefore, the trial court did not err in dismissing plaintiff's case.

Affirmed.

/s/ Jane E. Markey
/s/ Kirsten Frank Kelly